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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 259.

E. A. BROWNING, PLAINTIFF IN ERROR,

vs.

CITY OF WAYCROSS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED MAY 16, 1913.

(23,213)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1914.

1 In Court of Appeals of Georgia.

E. A. BROWNING, Plaintiff in Error,
vs.
CITY OF WAYCROSS, Defendant in Error.

Writ of Error from Ware Superior Court, Waycross Judicial Circuit.

Be it remembered, that on the 19th day of April in the year 1911, there came on to be tried in the Municipal Court of the City of Waycross, before Hon. John M. Cox, Mayor of said City, then and there presiding, the case of the City of Waycross vs. E. A. Browning, who was charged with a violation of the ordinance to levy and collect specific and occupation tax by said City of Waycross for the year 1911 upon lightning rod agents or dealers engaged in the business of putting up or erecting lightning rods, in the sum of twenty-five dollars; that a plea of not guilty being entered, and while admitting that said defendant had engaged as an employee of the St. Louis Lightning Rod Company in taking orders for lightning rods and erecting same in said City of Waycross, without first having paid the specific and occupation tax aforesaid, but refusing to pay same, evidence was submitted and upon the conclu n of same and the argument of the case, the said defendant was adjudged guilty and sentenced to pay a fine of one hundred dollars, or in default
2 thereof to work upon the chain-gang of said City for a period of ninety days.

Be it further remembered, that thereafter within the time allowed by law, to-wit, on May 6th 1911, a petition for certiorari was sued out on behalf of said defendant alleging that the Court erred in adjudging him to be guilty and imposing the sentence aforesaid upon him, and assigning the same as error for the reason that under the evidence introduced the same was illegal and in violation of the Interstate Commerce clause of the Constitution of the United States, which petition was duly sanctioned on said date by his Honor T. A. Parker, Judge of said Ware Superior Court, and thereupon filed in the office of the Clerk of said Court, and the writ of certiorari regularly issued directed to said Hon. John M. Cox, Mayor of said City of Waycross, returnable to the May term 1911 of said court.

Be it further remembered, that said case thereafter came on for a hearing before His Honor T. A. Parker, Judge as aforesaid, upon the said petition, writ of certiorari and answer, the same being as follows, to-wit:

"STATE OF GEORGIA,
County of Ware:

To the Superior Court of said County:

The petition of E. A. Browning shows that on the 19th day of April in the year 1911, there came on to be tried in the Municipal

Court of the City of Waycross in said State and County, before Hon. John M. Cox, Mayor of said City, then and there presiding,
3 the case of the City of Waycross vs. E. A. Browning, who was charged with a violation of the ordinance to levy and collect specific and occupation taxes by the City of Waycross for the year 1911, as provided for by Section 37 of the New Charter of the City of Waycross contained in the Georgia Laws of 1910, upon lightning-rod agents, or dealers engaged in the business of putting up or erecting lightning rods, the sum of twenty-five dollars. Upon the call of said case J. L. Sweat, Counsel for the St. Louis Lightning Rod Company, who appeared as attorney for said E. A. Browning, defendant in said case, entered a plea of not guilty, while admitting that said defendant had engaged as an employee of said St. Louis Lightning Rod Company in taking orders for lightning rods and erecting same in said City of Waycross, without first having paid the specific and occupation tax in the sum of twenty-five dollars as aforesaid, but refusing to pay the same, and with W. W. Lambdin representing said City of Waycross, the following evidence was introduced on behalf of said defendant to-wit:

First.

A copy of the orders taken by defendant and other employees of said St. Louis Lightning Rod Company in said City of Waycross, during the year 1911, was submitted in evidence and is as follows:

4 *Order for Delivery.*

No. —.
Location — Miles — of —.

—— —, 19—.

Mr. —— ——.

SIR: You will please deliver at your very earliest convenience from St. Louis Lightning Rod Company material for a system of Circuit Lightning Rods for my — with — points and — rods to the ground, and I will pay for same on delivery, in cash or note due —— at the rate of 47½ cents per foot for Rod, the price of seven feet of Rod for each steel Standard $3.50 for each Point $2.50 for each Ball, and $3.00 for each Arrow.

This order not to be countermanded without the consent of the Company. Further, I agree, should I fail in any way to comply with any of the conditions of this contract upon the delivery of this bill of material, it shall be considered as a cash transaction, due and collectable on demand, waiving all right to avail myself of any homestead or exemption law of this State as to the payment of this debt. No charge shall be made for the erection of this material, if done at the time of delivery. Ship the above material for me.

(Signed) —— ——.

To —— ——.

5 Second.

The defendant, E. A. Browning, stated under oath that as an employee of the St. Louis Lightning Rod Company, a corporation under the laws of the State of Missouri, having its principal office and place of business at the City of St. Louis in said State, that he, together with two other employees of said company, had been engaged during the said year 1911 in taking orders similar to the copy submitted in evidence, which orders were transmitted to said principal office and place of business at St. Louis, and thereupon the material called for by said orders was shipped by said St. Louis Lightning Rod Company in bulk and in completed form consigned to itself at Waycross, whereupon defendant delivered said material, separating same for each customer as called for by the order, and proceeded to erect the lightning rods upon the house- of the customers, collecting the amount of each order and without any extra charge being made for the erection, remitting the same direct to said St. Louis Lightning Rod Company at the City of St. Louis, Missouri; that it required special skill, which defendant claimed to have, to properly erect said lightning rods, and that the same was necessary to enable said St. Louis Lightning Rod Company to successfully carry on the Interstate Commerce or business in which it was engaged.

6 Third.

W. O. Peebles, sworn as a witness for the defence, testified also that he, together with the defendant and another employee of the St. Louis Lightning Rod Company, had been engaged during the year 1911 in taking orders in the City of Waycross for material, similar to the copy order submitted in evidence; that said orders were transmitted to the principal office and place of business of said St. Louis Lightning Rod Company, at the City of St. Louis, in the State of Missouri, and where said company was engaged in the manufacture and sale of lightning rod material; that the material as called for by each order was shipped by said company from St. Louis, consigned to itself at Waycross, and that upon the arrival of the material in completed form, the same was thereupon delivered in separate quantities as called for by the order and erected upon the houses of the customers by defendant, special skill being required for that purpose and without any extra charge being made for erecting the lightning rods, the amount of each order would thereupon be collected in cash or notes and the same transmitted to said St. Louis Lightning Rod Company; that the erection of said lightning rods by a skilled employee of the company was necessary to enable said company to successfully carry on the business in which it was engaged in the manufacture and sale of lightning rods, and

7 that the special license or occupation tax required by the City of Waycross of defendant, and which he had refused to pay was a burden upon and interference with the Interstate Commerce or business in which said St. Louis Lightning Rod Company was engaged, and in connection with which defendant and others were employed in the City of Waycross.

There being no further evidence, the Court, upon argument of the case by counsel, adjudged the defendant to be guilty and sentenced him to pay a fine of one hundred dollars, or in default thereof, to work upon the chain-gang of said City for a period of ninety days.

Peti-oners avers that said Court — in adjudging him to be guilty and imposing the sentence aforesaid upon him, which the petitioner assigns as error, and for the reason that under the evidence aforesaid the same was illegal and in violation of the Interstate Commerce Clause of the Constitution of the United States.

Wherefore, in order that said errors may be reviewed and corrected, petitioner prays that the State's writ of certiorari may be issued directed to Honorable John M. Cox, Mayor of the City of Waycross, in terms of the law, requiring him to certify and send up all the proceedings in said case to the May term 1911 of the
8 Superior Court of said County, that such judgment may be rendered therein as may seem in accordance with law.

And your petitioner will ever pray.

J. L. SWEAT,
Petitioner's Attorney.

STATE OF GEORGIA,
Ware County:

I, E. A. Browning, do solemnly swear that the petition for certiorari is not filed in the case for the purpose of delay only, and I verily believe I have good cause for certiorari; and that the facts stated in the foregoing petition so far as they come within my own knowledge are true, and so far as they are derived from the knowledge of others, I believe them to be true.

E. A. BROWNING.

Sworn to and subscribed before me, this April 20th, 1911.
J. W. STRICKLAND,
Clerk of Counsel.

GEORGIA,
Ware County:

In the case of the City of Waycross vs. E. A. Browning, in the Mayor's Court of said City and in the State and County aforesaid, said E. A. Browning being dissatisfied with the judg-
9 ment and sentence rendered therein adjudging him to be guilty of violating the ordinance to levy and collect specific and occupation taxes by the City of Waycross for the year 1911, as provided for by Section 37 of the New Charter of the City of Waycross, contained in the Georgia Laws of 1910, upon lightning rod agents or dealers engaged in the business of putting up or erecting lightning rods, in the sum of twenty-five dollars, for having failed and refused to pay said specific and occupation tax in said sum and sentencing him, the said E. A. Browning, to pay a fine of one hundred dollars and costs, or in default thereof to work upon the chain-gang of said City of Waycross for a period of ninety days, and de-

siring to certiorari said case, brings D. L. Keen and tenders him as security, and thereupon the said E. A. Browning as principal and the said D. L. Keen as security, acknowledge themselves jointly and severally bound to said City of Waycross, its successors and assigns, in the sum of Two Hundred dollars, conditioned that the defendant, the said E. A. Browning, will personally appear and abide the final judgment, order or sentence upon him in said case, for the payment of which said sum, they, the said E. A. Browning as principal and the said D. L. Keen as security, bind themselves, their heirs, executors and administrators firmly by these presents.

10 Witness their hands and seals this April 20, 1911.

E. A. BROWNING. [L. S.]
D. L. KEEN. [L. S.]

Attested and approved by:

J. W. STRICKLAND,
Clerk of Counsel.

CITY OF WAYCROSS,
Ware County, Georgia:

I, J. W. Strickland, Clerk of said City of Waycross, do hereby certify that no costs have accrued on the trial of the case to which the foregoing petition and bond refer, and that said E. A. Browning petitioner for certiorari has *b*iven bond and security as required by law.

This April 20th, 1911.

J. W. STRICKLAND,
Clerk of Council.

The within petition for certiorari read and sustained. Let the writ of certiorari issue as prayed.

T. A. PARKER,
Judge, W. C.

Original petition, &c. filed in office, this May 6, 1911.
CHAS. E. CASON,
Deputy Clerk.

11 Superior Court of said County.

GEORGIA,
Ware County:

To Honorable John M. Cox, Mayor, City of Waycross:

Whereas, E. A. Browning alleges by his petition for certiorari that on the 19th day of April 1911, there came on to be tried in the Municipal Court of said City of Waycross, before you as Mayor of said City of Waycross, then and there presiding, the case of said City of Waycross against said E. A. Browning, charged with a violation of the ordinance to levy and collect specific and occupation

tax by the City of Waycross for the year 1911, as provided for by Section 37 of the New Charter of said City of Waycross, contained in the Georgia Laws of 1910, upon Lightning Rod Agents or dealers engaged in the business of fitting up or erecting lightning rods, in the sum of twenty-five dollars, in which judgment was rendered by you as Mayor aforesaid adjudging the said E. A. Browning to be guilty and sentencing him to pay a fine of one hundred dollars or in default thereof to work upon the chain-gang of said City of Waycross for a period of ninety days, with which judgment said E. A. Browning is dissatisfied; and.

Whereas, he, the said E. A. Browning, has complied with the requirements of the law in cases of application for certiorari.

12 Now therefore, you are hereby notified and required to certify and send up to the Superior Court to be held in and for said County on the third Monday in May 1911, under your hand and seal, all the facts and proceedings in said case in your court aforesaid.

Witness the Honorable T. A. Parker, Judge of said Court, this May 6th, 1911.

CHAS. E. CASON,
Deputy Clerk Ware Superior Court.

Due and legal service of the foregoing petition and writ of certiorari is hereby acknowledged, and copy, time and *and* all other or further service waived. This May 6th, 1911.

JOHN M. COX,
Mayor City of Waycross.

Due and legal notice of the sanction of the writ of certiorari in the foregoing case, and of the time and place of hearing acknowledged, and all other or further notice and service waived. This May 6th, 1911.

LEON A. WILSON,
Attorney City of Waycross.

13 *Certiorari.*

In Ware Superior Court, May Term, 1911.

E. A. BROWNING, Plaintiff in Certiorari,
vs.
CITY OF WAYCROSS, Defendant in Certiorari.

And now comes J. M. Cox, Mayor of the City of Waycross and for answer to the writ of certiorari served upon him in said case and in answer to plaintiff's petition, says:

First.

The allegations set out in said petition that said E. A. Browning was tried before me in the Police Court upon the charge of having

been engaged in putting up and erecting lightning rods in the City of Waycross without having first paid the occupation tax required by said City, as provided in its Ordinance on the subject; and that the defendant entered a plea of not guilty claiming that he was protected by the Interstate Commerce clause of the Constitution of the United States, but that he admitted that he had been engaged as an employee of the St. Louis Lightning Rod Company in erecting lightning rods in the City of Waycross during the present year without having first paid the license or occupation tax provided by the Ordinance of said City on the subject, are admitted.

14 Second.

Respondent shows that the evidence submitted in the trial of the case was as follows:

Defendant placed in evidence a copy of a blank form of order for lightning rods, which he testified that he and other employees of the St. Louis Lightning Rod Company took for lightning rods in the City of Waycross during the year 1911, same being of the form set out in the petition for certiorari.

Defendant testified that his chief business was to put up lightning rods as an employee of the St. Louis Company and that he had done so recently within the present year in the City of Waycross, but that when he was not employed in actually putting up these lightning rods he occasionally solicited orders for same of the form aforesaid. He testified that the Company was a corporation under the laws of the State of Missouri, and having its principal office and place of business in the City of St. Louis in said State and that he together with other employees of the Company have been engaged during the year 1911 in taking orders of the form above stated, but that the other employees of the Company looked after the taking of orders more particularly then he did. He further testified that these orders were transmitted to the principal office of the Company at St. Louis, and that thereupon after a lot
15 of orders had accumulated so as to make up a sufficient quantity for shipment in car load lots, that the materials called for by said orders were then shipped by the Company in bulk in car load lots consigned to itself at Waycross, Georgia; that the material for each order was not segregated or separated or identified in any way from the balance of the materials contained in the shipment but were all shipped in bulk together, the rods being shipped in 4 ft. 6 ft. 8 ft. and 10 ft. lengths; that on the arrival of these materials in Waycross it was his custom to take same in his wagon and go from house to house and put up the lightning roads; that when he went to any particular house he would take from his wagon the materials with which to put up the particular job, selecting suitable lengths of the materials so as to suit the height of the house, etc., that the rods and materials for any particular job were not separated or different from the other jobs but were all alike, except where particular ornaments were ordered; and that he hauled these materials around in his wagon and that he put up the lightning rods on the different houses from same in-

discriminately. He then collected the amount of each order without any extra charge being made for the erection, and remitted the same direct to his Company at St. Louis; that it required special skill, which he claimed to have, to properly erect said lightning rods, there were no marks or names on any of the rods shipped showing the orders to be filled thereby.

W. O. Peebles sworn as a witness for the defendant, testified to the same effect as above set forth.

There being no further evidence the defendant was found guilty and was sentenced to work upon the streets of the City for ninety days, or to be discharged upon payment of $100.00, which sentence was duly entered on the docket of the Police Court.

All of which is respectfully submitted,

JOHN M. COX,
Mayor City of Waycross.

Answer of J. M. Cox, Mayor. Filed in office this 20th day of June, 1911.

CHAS. E. CASON,
Deputy Clerk."

Be it further remembered, that after considering the foregoing petition and answer, said Judge, the Honorable T. A. Parker, then and there presiding upon the hearing of said case, passed an order on December 27th, 1911, overruling and dismissing the said certiorari and entering judgment therein in favor of said City of Waycross against the said E. A. Browning for the costs in said case, said order and judgment being as follows:

"The within certiorari having this day come on for a hearing, and considering same upon the petition and answer thereto, and argument of counsel; it is hereby considered, ordered and adjudged by the Court that said certiorari be and the same is hereby overruled and dismissed and that the City of Waycross recover of said E. A. Browning the sum of $— costs."

This December 27th, 1911.

T. A. PARKER,
Judge S. C. W. J. Circuit."

And be it further remembered, that from the order and judgment aforesaid of said Hon. T. A. Parker, Judge of said Ware Superior Court, overruling and dismissing the said certiorari at the cost of plaintiff in certiorari, said E. A. Browning then and there excepted and now excepts and assigns error thereon and says that the Court erred in overruling and dismissing said certiorari at his cost, but should have sustained same, and for the reason that under the facts appearing in evidence as set forth in the petition for certiorari and answer thereto, incorporated herein, that the judgment of the said Mayor's Court adjudging said E. A. Browning guilty and imposing a penalty upon him, was illegal and in violation of the Interstate Commerce clause of the Constitution of the United States; said

petition and answer being alone material to a clear under-
18 standing of the errors alleged in this Bill of Exceptions.

And now, within the time provided by law, and within thirty days of the entry of the order overruling said certiorari and adjudging the costs thereof against the plaintiff in certiorari, comes the said E. A. Browning, and tenders this his Bill of Exceptions and prays that the same may be certified as provided by law, in order that the errors complained of may be considered and corrected by the said Court of Appeals of Georgia.

J. L. SWEAT,
Attorney for Plaintiff in Error.

P. O. Address, Waycross, Georgia.

I do certify that the foregoing Bill of Exceptions is true, and contains all of the evidence, and contains and specifies all the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Ware County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this Bill of Exceptions specified, and certify the same as such, and cause the same to be transmitted to the October Term 1911 of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 11th day of January 1912.

T. A. PARKER,
Judge S. C. W. C.

19 GEORGIA,
Ware County:

Clerk's Office, Superior Court of said County.

I, E. J. Berry, Clerk of said Court, do hereby certify that the foregoing pages of typewriting is the true original Bill of Exceptions filed in this office in the case of E. A. Browning, Plaintiff in Error, vs. City of Waycross, Defendant in Error, a copy of which is now on file in said office.

Witness my official signature and the seal of said Court hereto affixed, this the 25th day of January 1912.

[OFFICIAL SEAL.]

E. J. BERRY,
Clerk Ware Superior Court.

[Endorsed:] Due and legal service of the within bill of exceptions acknowledged, copy received and all other or further service waived. C. L. Redding and Wilson, Bennett & Lambdin, Attorneys for defendant in error, P. O. Address, Waycross, Ga. This January 17, 1912. Origianl Bill of Exceptions. Filed in office, this Jan. 22, 1912. E. J. Berry, Clerk Ware S. C.

20 [Endorsed:] Case No. 3983. Court of Appeals of Georgia, March Term, 1912. Browning v. City of Waycross. Bill of Exceptions. Filed in office Jan. 26, 1912. W. E. Talley, D. C. C. A. Ga. (No transcript.)

21 Court of Appeals of Georgia.

3983.

BROWNING
v.
CITY OF WAYCROSS.

The interstate-commerce clause of the Federal constitution does not prohibit a State or one of its subordinate political subdivisions from imposing a reasonable occupation tax upon the business of "putting up or erecting lightning-rods," and a person engaged in such a business is subject to the tax, notwithstanding it appears that the lightning-rods were sold by him as agent for a non-resident manufacturer, under a contract which required the seller to install the lightning-rods. This is true without reference to whether the lightning-rods are shipped from the foreign State directly to the purchaser or are shipped as a part of a common mass with other property of the same character to the agent of the seller and distributed by him to the purchaser. Such a tax affects only incidentally, and does not impose an unlawful burden upon, interstate commerce.

POTTLE, *J.*:

The plaintiff in error was convicted of the violation of an ordinance of the City of Waycross, and excepts to the overruling of his certiorari. The ordinance imposed an occupation tax of $25 "upon lightning-rod agents or dealers engaged in the business of putting up or erecting lightning-rods." The plaintiff in error was employed as agent of the St. Louis Lightning Rod Company, a non-
22 resident corporation, to solicit and sell lightning-rods. During the year 1911 he, together with another agent of that company, solicited a large number of orders in the City of Waycross. The manner in which the business was carried on was that the purchaser would deliver to the soliciting agent a written order, addressed to the agent, for a certain quantity and quality of lightning-rods, and at a certain price. In the written order there was nothing said directly in reference to the installation of the lightning-rods bought, but it was understood that this was to be done by the agent taking the order, or some other agent of the seller. It was the practice that the orders, when taken, were forwarded to the residence of the seller, and, when a sufficient quantity to make up a car-load had been sold, as shown by these orders, the car would be shipped to Waycross, consigned to the St. Louis Lightning Rod Company. Upon arrival of the car in Waycross, the agent who was to make delivery would take the lightning-rods from the car, load them on a wagon, and deliver them in this way from house to house to the purchasers. There was no mark on any particular set of lightning-rods to indicate that they were designed for any particular individual. They were received in bulk by the agent, and from the car

of rods the various orders would be filled, according to the specifications set out in each. It required special skill to put the rods together and install them on the house, but this was done without any extra charge over and above the amount stated in the order. When the rods were installed on the house the amount of each order would be collected in cash or notes by the agent and transmitted to his employer in St. Louis. The plaintiff in error had not paid the occupation tax required by the ordinance for the year 1911, nor had any one else paid it for him.

The only point presented for our consideration is whether the ordinance of the City of Waycross is void, as being in conflict with the interstate-commerce clause of the Federal constitution. In 1899, upon the authority of the decisions of the Supreme Court of the United States, as they were then understood and construed, the Supreme Court of this State held that the commerce clause of the Federal constitution does not prevent a State from imposing, for revenue purposes, a license tax upon agents of principals residing in other States, who make executory contracts for the sale of goods, and who, when the goods are shipped into this State, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers. Racine Iron Co. v. McCommons, 111 Ga. 536. That decision was based upon the idea that, the goods having been shipped into this State in bulk to the agent, who distributed them among the purchasers, in compliance with their respective contracts, the State had complete authority to impose a tax upon the business of the agent, since the goods were not actually delivered to the purchaser until after they became a part of the mass of property in this State. After the rendition of that decision, and in 1903, the Supreme Court of the United States had under consideration a case from North Carolina, involving practically the identical facts of the McCommons case. (Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336.) In that case it appeared, that the agent took orders for portraits to be shipped into North Carolina by a Chicago corporation; that the orders were taken and forwarded to this corporation, and, when a sufficient number had accumulated, the corporation would load the portraits into a car and ship them by freight to North Carolina, consigned to the order of the corporation itself or to its agent. Upon arrival of the car, the agent would take charge of it, put the portraits in the frames to which they belonged respectively, and deliver them to the purchasers. The Supreme Court of North Carolina held that the ordinance was a valid exercise of the taxing power of the City of Greensboro, for the reason that the portraits were shipped to the order of the seller, and the agent of the seller opened the boxes in which the portraits were shipped, took out the portraits and frames, assorted them and put them together, and delivered them to the purchasers in the City of Greensboro. This was thought by the Supreme Court of North Carolina to be the distinction between the case then being dealt with and the decision in the case of Brennan v. Titusville, 153 U. S. 289. This distinction, however,

was summarily disposed of by the Supreme Court of the
25 United States on review, and it was directly held, in a unanimous decision, that the ordi-ance in question operated as an unlawful burden on interstate commerce, and was for this reason void. Similar cases again reached the Supreme Court of Georgia, after the rendition of the decision in Caldwell v. North Carolina. The former ruling of our Supreme Court was overruled, and it was held that, "one who, in this State, as the representative of a principal residing in another State, takes orders on such principal for the purchase of goods held in such other State, and who, when the goods are shipped by his principal to him receives them in this State, breaks the original packages in which they are contained, distributes them among the customers from whom he obtained such orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce." Stone v. State, 117 Ga. 292. To the same effect see Kehrer v. Stewart, 117 Ga. 969.

Since the decisions of the Supreme Court of the United States upon questions involving the construction and application of the Federal constitution are the supreme law of this State, it becomes necessary to ascertain whether there is any valid distinction between the case now in hand and the case of Caldwell v. North Carolina, supra. If there is no rational distinction, this ordinance must be held to be void. It is argued that a material point of difference lies in the fact that no separate lot of lightning-rods were designed for any particular individual, but that they were shipped in car-
26 load lots in a common mass, received by the agent of the seller in this State, put together with such mechanical skill as was necessary for the purpose, and delivered from house to house in compliance with the orders previously given, and that no particular purchaser had any claim upon or title to any particular set of lightning-rods. It is said this is altogether unlike the case wherein the portraits were sold and delivered, because there, from the very nature of the case, each particular portrait was designed for some particular purchaser. We are inclined to think that this distinction which counsel seeks to draw is somewhat shadowy and unsubstantial. In the portrait case the agent in North Carolina put together the frames, placed in each frame the portrait for which it was designed, and in this condition delivered the portrait and frame to each purchaser. But without reference to whether there is any rational distinction between the two cases, so far as this point is concerned, we do believe there is a material point of difference between the cases. It will be observed that in all of the cases which have been passed upon by the Supreme Court of the United States, including the Caldwell case, the tax was levied, either directly or indirectly, on the business, because a "tax on the occupation of doing a business is a tax on the business." It is freely conceded by us, as it must be, that if this ordinance, properly construed, imposes any substantial burden on interstate commerce, whether directly or indirectly, it is
27 absolutely void and of no effect. The ordinance does not purport to levy a tax or license fee either upon the business of selling lightningrods or upon the agency appointed by the seller

to consummate this purpose. It undertakes merely to impose a tax "upon lightning-rod agents or dealers engaged in the business of putting up or erecting lightning-rods." Courts are always inclined, where it can be done without violence to the language employed, to give to a law a construction which prevents it from coming in conflict with the fundamental law of the State or general government. The primary object of this ordinance is to exact a license fee from persons engaged in putting up or installing or erecting lightning-rods. The business of installing lightning-rods is not so necessary a part of the business of manufacturing and selling lightning-rods as that the two cannot be separated for purposes of taxation. The evidence shows, and we may know judicially, that it requires more or less mechanical skill to install a system of lightning-rods properly. There is no reason why a purchaser could not buy lightning-rods from the St. Louis manufacturer and install them himself, either directly by his own effort, or through the medium of a local agent. For example, if the plaintiff in error had simply taken orders for the sale and delivery of these lightning-rods, and had carried along with him another man, not employed by the manufacturer, who made separate contracts for the installation and erection of the
28 lightning-rods, it could not be doubted that the City of Waycross would have full power and authority to exact from such a person a reasonable occupation tax. It is true that in the present case it appears that the agent who made the sale likewise agreed, in behalf of his principal and as a part of the contract of purchase, and without increasing the contract price, to install the lightning-rods, but we do not think this makes any substantial difference. Relatively to this matter, the interstate commerce which is protected by the Federal constitution is "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made." Caldwell v. North Carolina, supra. It does not include mere incidents which are not necessary parts of the contract of sale. There are many laws enacted by the States and their subordinate political divisions which incidentally bear upon and affect interstate commerce, but the rule has been announced, time and time again, by the supreme tribunal of the general government, that such laws, having merely an incidental, unsubstantial and immaterial effect upon interstate commerce, are not prohibited by the commerce clause of the Federal constitution. The non-resident will be protected fully and completely in carrying on its business with citizens of this State, in making and consummating its contract of sale, up to and including actual delivery to the purchaser, but we do not believe that it was ever contemplated by the commerce clause of the constitution
29 or by the decisions of the United States Supreme Court construing it, that an agent appointed by a non-resident, not only to make a sale, but to perform some other act, not a necessary part of the sale, and having no necessary connection with interstate commerce, would be exempt from the reasonable exercise of the taxing power of the State, operating solely upon the act which was not a necessary part of the contract of sale. A case might be conceived

of where on account of the peculiar nature of the article or the secrecy of the process, only the seller or manufacturer could put it in condition to be used, and where the article would be worthless unless delivered in complete state, ready for use. In such a case, to take away the right to put it in condition for use would practically destroy the sale; and hence, where the article was the subject of an interstate sale, to tax the right to install it would be an unlawful interference with interstate commerce. For example, if a portable house should be the subject of an interstate sale, and it could only be put together by a process known to the manufacturer, he would be protected from interference, both in making the sale and in erecting the house. But if, on the other hand, the house was simply made of blocks which could be cemented together by any one skilled in general work of that nature, we think the business of putting the house together might be separated, for purposes of taxation, from the business of selling. And so, if a grain dealer in Chicago
30 should sell to a planter in Georgia a car-load of seed wheat, the mere fact that, as part of the contract of sale, he agreed to sow the wheat would not preclude the State from collecting from him a license fee imposed upon the business of planting grain for hire. But such is not the case here, or at least the evidence does not admit of such a conclusion. So far as appears, any skilled mechanic can put up lightning-rods. While some special aptitude is required, it is not of such a peculiar character as to justify the inference that it would unduly hamper or prevent the sale if the seller should not install the rods on the purchaser's house. Hence, to tax merely the business or occupation of installing the rods is not an unlawful interference with interstate commerce. The only case which has been called to our attention involving the exact question now presented is that of State v. Gorham, 115 N. C. 721 (44 Am. St. R. 494), wherein the Supreme Court of North Carolina reached the same conclusion that we have arrived at in this case. In principle a recent decision of the Supreme Court of Alabama is also in point. American Amusement Co. v. East Lake Chutes Co. 56 So. 961.

The case is unlike that of Rogers v. Sandersville, 120 Ga. 193, where it was held that the posting of bills to advertise wares for sale was only incidental to the sale, and could not be separated from it for purposes of taxation. There could be no sale without advertisement of some sort, either by word of mouth or printed signs, or
31 display of the goods and the like. Such an act is merely an offer or invitation to buy, and is necessarily part and parcel of the sale. Such is not the case where the business upon which the tax is laid is not necessary to effectuate the sale, though it may in point of fact facilitate it. As was said by Mr. Justice Lamar in the Rogers case, "a man may have more than one business, and be taxed for each." The business of building houses might facilitate the sale of building materials, but one engaged in both enterprises could be taxed for each. We hold that the ordinance involved was a valid exercise of the taxing power of the City of Waycross.

Judgment affirmed.

Russell, J., concurs dubitante.

32 Court of Appeals of the State of Georgia.

ATLANTA, *April* 2, 1912.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

E. A. BROWNING
v.
CITY OF WAYCROSS.

This case came before this court upon a writ of error from the superior court of Ware county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Bill of costs, $10.00.

33 In Court of Appeals, March Term, 1911.

Number 3983.

E. A. BROWNING, Plaintiff in Error,
vs.
CITY OF WAYCROSS, Defendant in Error.

Writ of Error from Ware Superior Court, Waycross Judicial Circuit.

To the Honorable Court of Appeals of Georgia:

Now comes E. A. Browning, Plaintiff in Error in above stated case, by his Attorney-at-Law, J. L. Sweat, and moves for a rehearing of said case upon the following grounds:

First.

Because said Court in the consideration of said case and in the decision and opinion rendered therein, has, in the opinion of counsel for plaintiff in error, overlooked certain material facts in the brief of evidence incorporated in the Bill of Exceptions in said case, or misunderstood and misconstrued same; and has overlooked or misunderstood and misconstrued certain decisions which, in the opinion of said counsel, are controlling as authority and which would require a different judgment from that rendered.

34 Second.

The evidence referred to above is as follows:

"A copy of the orders taken by defendant and other employees of said St. Louis Lightning Rod Company in said City of Waycross, during the year 1911, was submitted in evidence and is as follows:

Order for Future Delivery.

No. —.
Location — Miles — of —.

—— —, 19—.

Mr. —— ——.

SIR: You will please deliver at your very earliest convenience from St. Louis Lightning Rod Company, material for a system of Circuit Lightning Rods for my — with — points and — rods to the ground and I will pay for same on delivery, in cash or note due — at the rate of 47½ cents per foot for Rod, the price of seven feet of Rod for each steel Standard $3.50 for each Point $2.50 for each Ball, and $3.00 for each Arrow.

This order not to be countermanded without the consent of the Company. Further, I agree, should I fail in any way to comply with any of the conditions of this contract upon the delivery of this bill of material, it shall be considered as a cash transaction, due and collectable on demand, waiving all right to avail myself of any homestead or exemption law of this State as to the payment of this debt. No charge shall be made for the erection of this ma-
35 terial, if done at the time of delivery.

Ship the above material for me.
(Signed) —— ——.

To —— ——."

And also "The defendant, E. A. Browning, stated under oath that as an employee of the St. Louis Lightning Rod Company, a Corporation under the laws of the State of Missouri, having its principal office and place of business at the City of St. Louis in said State, that he, together with two other employees of said company, had been engaged during the said year 1911 in taking orders similar to the copy submitted in evidence, which orders were transmitted to said principal office and place of business at St. Louis, and thereupon the material called for by said orders was shipped by said St. Louis Lightning Rod Company in bulk and in completed form consigned to itself at Waycross, whereupon defendant delivered said material, separating same for each customer as called for by the order, and proceeded to erect the lightning rods upon the houses of the customers, collecting the amount of each order and without any extra charge being made for the erection, remitting the same direct to said St. Louis Lightning Rod Company at the City of St. Louis, Missouri; that it required special skill, which defendant claimed to have, to properly erect said lightning-rods, and that the same was necessary to enable said St. Louis Lightning Rod Company to successfully carry on the Interstate Com-
36 merce or business in which it was engaged."

Third.

The decisions referred to are the following: Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336.

And also, Stone v. State, 117 Ga. 292. To the same effect see Kehrer v. Stewart, 117 Ga. 969.

Fourth.

In the opinion rendered appears the following:

"It is freely conceded by us, as it must be, that if this ordinance, properly construed, imposes any substantial burden on interstate commerce, whether directly or indirectly, it is absolutely void and of no effect."

And also, "The ordinance does not purport to levy a tax or license fee upon the business of selling lightning-rods or upon the agency appointed by the seller to consummate this purpose."

As a matter of fact the effect of the ordinance referred to is the levying of a tax or license fee in this particular case upon an essential part of the business of selling lightning-rods, and upon the agency appointed by the seller to consummate this purpose as in the orders taken it appears that the lightning-rods were to be erected by the St. Louis Lightning Rod Company by and through its agents, upon the houses of its customers, the purchasers, without any extra cost or charge therefor, and it is to be presumed that without such stipulation a sale could not be made and consummated.

37 Fifth.

In said opinion there appears also the following statement: "There is no reason why a purchaser could not buy lightning-rods from the St. Louis manufacturer and install them himself, either directly by his own effort, or through the medium of a local agent." There is no evidence in the record showing that purchasers of lightning rods from the St. Louis Lightning Rod Company could install them themselves by their own efforts or through the medium of a local agent.

Sixth.

There appears also in said opinion this further statement: "It is true in the present case it appears that the agent who made the sale likewise agreed, in behalf of his principal and as a part of the contract of purchase, and without increasing the contract price, to install the lightning-rods, but we do not think this makes any substantial difference. Relatively to this matter the interstate commerce which is protected by the Federal constitution is "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made." Caldwell v. North Carolina, supra. It does not include mere incidents which are not necessary parts of the contract of sale."

The mistake or misunderstanding in said statement is the conclusion reached that the erection of lightning-rods is a mere
38 incident and not a necessary part of the contract of sale, whereas in the case at bar such appears to be the fact.

Seventh.

There also appears in said opinion the following statement: "The non-resident will be protected fully and completely in carrying on its business with citizens of this State, in making and consummating

its contract of sale, up to and including actual delivery to the purchaser, but we do not believe that it was ever contemplated by the commerce clause of the constitution or by the decisions of the United States Supreme Court construing it, that an agent appointed by a non-resident, not only to make a sale, but to perform some other act, not a necessary part of the sale, and having no necessary connection with interstate commerce, would be exempt from the reasonable exercise of the taxing power of the State, operating solely upon the act which was not a necessary part of the contract of sale."

The same error exists in the conclusions reached by the Court in its construction and application of the decisions referred to to the facts of this case.

Eighth.

Again this statement appears in said opinion: "So far as appears, any skilled mechanic can put up lightning-rods. While
39 some special aptitude is required, it is not of such a peculiar character as to justify the inference that it would unduly hamper or prevent the sale if the seller should not install the rods on the purchaser's house. Hence, to tax merely the business or occupation of installing the rods is not an unlawful interference with interstate commerce."

From the evidence in this case and reasonable deductions therefrom the conclusion is warranted that unless the St. Louis Lightning Rod Company, by and through the skill of its agents, contracted and undertook in the sales made of lightning-rods, to erect the same upon the houses of its customers, the purchasers, that sales would not be made and consummated, and hence a tax upon the occupation of the agent in the erection of the lightning-rods is material and an unlawful interference with interstate commerce.

Ninth.

Final reference is made to the following additional statement made in said opinion, to-wit:

"This case is unlike that of Rogers v. Sandersville, 120 Ga. 193, where it was held that the posting of bills to advertise wares for sale was only incidental to the sale, and could not be separated from it for purposes of taxation. There could be no sale without advertisement of some sort, either by word of mouth or printed signs,
40 or display of the goods and the like. Such an act is merely an offer or invitation to buy, and is necessarily part and parcel of the sale. Such is not the case where the business upon which the tax is laid is not necessary to effectuate the sale, though it may in point of fact facilitate it." And in this connection it is insisted that the contract to erect the lightning rods without any additional charge therefor by and through the skilled agents of the seller, the St. Louis Lightning Rod Company, not only facilitates the making of sales, but from all the evidence and proper conclusions deduced therefrom, the same is actually necessary to effect the sale. If, for instance, the agent in going through the country as well as the town, should only offer to sell and deliver lightning rods

without agreeing upon the part of the St. Louis Lightning Rod Company to properly erect same upon the houses of the purchasers, leaving them to undertake to do the work themselves, or secure the services of others to do so, the inevitable presumption is that they would decline to purchase. So that upon the whole, it does seem that the Honorable Court has misunderstood the essential facts of the case, and misconstrued and misapplied the decisions cited, and that upon a proper construction and application of same, instead of affirming the decision of the court below the same should
41 be reversed.

All of which is respectfully submitted.

J. L. SWEAT,
Attorney for E. A. Browning,
Plaintiff in Error.

Post Office Address, Waycross, Ga.

I, J. L. Sweat, counsel for plaintiff in error, Do hereby certify, that upon a careful examination of the opinion of the court, I believe the facts and decisions referred to have been overlooked by the Honorable Court of Appeals of Georgia, or misunderstood, misconstrued and misapplied.

This April 10th, 1912.

J. L. SWEAT,
Attorney for E. A. Browning,
Plaintiff in Error.

Post Office Address, Waycross, Ga.

Due and legal service of the within motion is hereby acknowledged, copy received, and all other and further service of same waived.

This April 10, 1910.

WILSON, BENNETT & LAMBDIN,
Attorney- for Respondent or Defendant in Error.

P. O. Address, Waycross, Ga.

42 [Endorsed:] No. 3893. In Court of Appeals of Georgia, March Term, 1912. E. A. Browning, Plaintiff in Error, vs. City of Waycross, Defendant in Error. From Ware Superior Court, Waycross Judicial Circuit. Original Motion for Rehearing. Filed in office, this April 11, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

43 Court of Appeals of the State of Georgia.

ATLANTA, *April* 16, 1912.

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

E. A. BROWNING
v.
CITY OF WAYCROSS.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between E. A. Browning, plaintiff in error, and City of Waycross, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff in error, E. A. Browning, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court
45 may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of April, in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the United States District Court
for the Northern District of Georgia.

Allowed by:

BENJAMIN H. HILL,
Chief Judge Court of Appeals
of the State of Georgia.

April 26, 1912.

Filed in office this April 26, 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Waycross, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Court of Appeals of the State of Georgia, wherein E. A. Browning is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error rendered, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Benjamin H. Hill, Chief Judge of the said Court of Appeals of the State of Georgia, the 26th day of April, in the year of our Lord, one thousand nine hundred and twelve.

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office May 4, 1912.

LOGAN BLECKLEY,
Clerk of the Court of Appeals of the State of Georgia.

47 In the Supreme Court of the United States.

E. A. BROWNING, Plaintiff in Error,
versus
CITY OF WAYCROSS, Defendant in Error.

Acknowledgment of Service.

Due service of Writ of Error and Citation in the above entitled cause is hereby acknowledged. Also service of præcipe from Plaintiff in Error designating portions of the record to be transmitted to the Supreme Court of the United States by the Clerk of the Court of Appeals of the State of Georgia.

Dated this 2nd day of May, 1912.

CITY OF WAYCROSS,
Defendant in Error,
By C. L. REDDING &
WILSON, BENNETT & LAMBDIN,
Its Attorneys.

Filed in office May 4, 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

48. E. A. BROWNING, Plaintiff in Error,
versus
CITY OF WAYCROSS, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia.

To the Honorable the Court of Appeals of the State of Georgia:

The petition of E. A. Browning, plaintiff in error in the above entitled cause showeth:

That on the 2nd day of April, 1912, the Court of Appeals of the State of Georgia made and entered a final judgment therein in favor of defendant in error, City of Waycross, a corporation, and against plaintiff in error, E. A. Browning, and thereafter upon the 16th day of April, 1912, overruled motion of said plaintiff in error for rehearing of said cause, filed April 11, 1912, and refused to grant rehearing thereof, or to set aside, or in any manner modify said judgment; in which judgment so entered on the 2nd day of April 1912, and the proceedings had prior thereto and in connection therewith in said cause certain errors were committed to the prejudice of this petitioner, E. A. Browning; all of which more in detail appear from the assignments of error filed with this
49 petition.

Petitioner, E. A. Browning, further shows that in said action there was drawn in question the validity of a statute of and authority exercised under the State of Georgia, on the ground of their being repugnant to the constitution of the United States and more particularly to the interstate commerce clause thereof, Art. 1, Sec. 8, and the decision was in favor of such their validity; and in the said action plaintiff in error, E. A. Browning, specially set up and claimed a right, privilege and immunity under the constitution of the United States and under the interstate commerce clause aforesaid, and the decision was against the right, privilege and immunity specially set up and claimed under such constitution, and that therein manifest error hath happe-d to the wrong and prejudice of said petitioner, E. A. Browning.

Petitioner further shows that the said Court of Appeals of the State of Georgia is the highest court of said State in which a decision in this action or proceeding can or could be had.

Wherefore, petitioner, E. A. Browning, prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Court of Appeals of the State of Georgia for the correction of the errors so complained of; and that a transcript of the record, proceedings and papers in this cause, duly authenti-
50 cated, may be sent to the said Supreme Court of the United States, and that the court fix amount of supersedeas bond and time within which same may be given by plaintiff in error and enter its order of supersedeas herein.

E. A. BROWNING,
Plaintiff in Error,
By J. L. SWEAT,
RICHARD A. JONES,
His Attorneys.

Filed in office April 26, 1912.

LOGAN BLECKLEY,
Clerk of the Court of Appeals of the State of Georgia.

51 In the Court of Appeals of the State of Georgia, —— Term, 1912. At Law.

E. A. BROWNING, Plaintiff in Error,
versus
CITY OF WAYCROSS, Defendant in Error.

This April 26, 1912, came the plaintiff in error in the above entitled cause, E. A. Browning, by his attorneys, and filed herein and presented to this court his petition praying for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

This court, being the court rendering the decision and judgment complained of, and the highest court of law or equity of the said State in which a decision could or can be had in said suit, the undersigned as chief judge of the said court, upon consideration of the said petition of plaintiff in error and the assignments of error filed therewith, does hereby allow the writ of error prayed,
52 the plaintiff in error to give and file herein within ten days from date hereof an approved bond according to law in the sum of $500, which shall operate as a supersedeas bond, and said bond and said writ of error to operate as a supersedeas.

In witness whereof, this order allowing said writ of error is signed by Hon. Benjamin H. Hill, chief judge of the said court of the Court of Appeals of the State of Georgia, this 26 day of April, in the year of our Lord one thousand nine hundred and twelve, in the City of Atlanta, State of Georgia.

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office this 26 day of April 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of the State of Georgia.

53 In the Supreme Court of the United States.

E. A. BROWNING, Plaintiff in Error,
vs.
CITY OF WAYCROSS, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That E. A. Browning of the City of Waycross, in the State of Georgia, as principal, and American Surety Company, as surety, are held and firmly bound unto the above named City of Waycross, in the sum of five hundred dollars ($500) to be paid to it, and for the payment of which, well and truly to be made. we bind ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 2nd day of May in the year of our Lord one thousand nine hundred and twelve.

Whereas, the above named, E. A. Browning, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States, to reverse judgment rendered in the above entitled action by the Court of Appeals of the State of Georgia.

Now therefore, the condition of this obligation is such that
54 if the above named plaintiff in error shall prosecute his writ of error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this application to be void, otherwise to remain in full force and virtue.

E. A. BROWNING,
By His Attorney at Law, J. L. SWEAT. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By MARION M. JACKSON,
Resident Vice President.
W. G. LEAS,
Resident Assistant Secretary.

[Seal of American Surety Company.]

Signature of E. A. BROWNING,
By His Attorney at Law, J. L. SWEAT.

Attested by
HERBERT W. WILSON, [NOTARIAL SEAL.]
N. P. Ware Co., Ga.

This bond approved this 4th day of May, 1912.
BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office May 4, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

55 In the Court of Appeals of the State of Georgia.

E. A. BROWNING, Plaintiff in Error,
versus
CITY OF WAYCROSS, Defendant in Error.

Assignments of Error.

Comes now the plaintiff in error in the above entitled cause, E. A. Browning, and states and avers that in the record and proceedings in said cause, the Court of Appeals of the State of Georgia erred to the injury and wrong of the plaintiff in error and to his prejudice and against his rights, in the following particulars, to wit:

1. The court erred in determining and adjudging that the plaintiff in error was subject to and required to pay tax provided by ordinance enacted by defendant in error under Section 37 of the New charter of the defendant in error, contained in the laws of the State of Georgia, and described in the record herein, requiring payment of the sum of $25 by lightning rod agents or dealers engaged in putting up or erection of lightning rods, and in affirming the judgment of the Superior Court of Ware County, Waycross judicial
56 Circuit, of said State, by which it refused to set aside or nullify the judgment of the municipal court of defendant in error, adjudging plaintiff in error guilty of a crime because of non-payment of said tax, and sentencing him therefor to fine of $100, or in default thereof to work upon the chain-gang of said city for a period of 90 days, all of the transactions of plaintiff in error, either as a lightning rod agent or otherwise, in the putting up or erection of lightning rods, or performance of other function or functions in connection therewith having reference to, solely concerning, directly connected with and being a part of the transaction of sale of lightning rods in commerce between citizens of the State of Georgia and State of Missouri, constituting interstate commerce, within the provisions and protection of interstate commerce clause of the constitution of United States, Art. 1, Sec. 8, not subject to any local law, or of the law of the State of Georgia or the authority sought to be exercised by defendant in error in the conviction and sentence of plaintiff in error as aforesaid.

2. The court erred in holding and determining that the putting up or erection of the lightning rods by plaintiff in error upon the building or construction for which they were purchased, provided by
57 the contract of sale to be made as a part of the consideration thereof and without charge to the purchaser, was not an incident and part of the sale of said rods, which sale was an interstate commerce transaction, and in refusing to hold that same was within the protection of the provisions of the constitution of the United States concerning commerce between the States, Art. 1, Sec. 8, and that plaintiff in error by putting up or erecting said lightning rods became liable to and was required to pay tax referred to in the record and to conviction and sentence for non-payment thereof by

the municipal court of defendant in error complained of and described in the record.

3. The court erred in determining that the transaction by which St. Louis Lightning Rod Company, a corporation of and located in the State of Missouri, sold to various persons in the State of Georgia lightning rods and agreed as part of the consideration for such sales to attach and put on the building for which intended the rods so purchased, did not constitute interstate commerce within the protection of the commerce clause of the constitution of the United States aforesaid, in so far as the erection of same upon the building was concerned and so that in the performance of such function for said company, plaintiff in error became subject to and was required to pay the tax for non-payment of which he was convicted and sentenced as described in the record.

58 4. The court erred in refusing to sustain the right, privilege and exemption especially set up and claimed by plaintiff in error under the constitution of the United States and under the interstate commerce clause thereof, Art. 1, Sec. 8, that the functions performed by him and for which he was sought to be taxed and for non-payment of which tax he was adjudged guilty of the crime and sentenced as in the record set forth, was interstate commerce, and was not within the right or power of the State of Georgia or of defendant in error, or any other except the congress of the United States to regulate or to in any manner burden or limit.

5. The court erred in refusing to determine or adjudge that the ordinance of the defendant in error under which plaintiff in error was convicted and sentenced, was in so far as it sought to affect plaintiff in error in the performance of the function of erection, putting up, installing or attaching lightning rods in the performance of sales constituting interstate commerce was of non effect and void as being in conflict with the interstate commerce clause of the constitution of the United States, Art. 1, Sec. 8, and could not constitute authority for the conviction or sentence of plaintiff in error for doing the acts or performing the functions described in

59 the record in this cause.

6. The court erred in determining that the erection or putting up of the lightning rods by plaintiff in error as described in the record and under contracts of sale therein described did not constitute the performance of a function directly dependent upon and a component part of commerce between the States and so within the protection of the constitution of the United States, and more particularly of the provision of the clause thereof relating to interstate commerce, Art. 1, Sec. 8.

7. The court erred in refusing to set aside and nullify the judgment of conviction and sentence of plaintiff in error by the municipal court of the City of Waycross, and refusing to sustain the right, privilege and immunity claimed by plaintiff in error, under Art. 1, Sec. 8 of the constitution of the United States violated thereby.

8. The court erred in refusing to sustain motion of plaintiff in error for rehearing of said cause.

9. The court erred in determining and adjudging that upon

the record in this cause plaintiff was not entitled to the right, privilege or immunity specially claimed by him under the constitution of the United States, Art. 1, Sec. 8 thereof.

60 This April 26, 1912.

J. L. SWEAT,
RICHARD A. JONES,
Attorneys for Plaintiff in Error, E. A. Browning.

Filed in office April 26, 1912.
LOGAN BLECKLEY,
Clerk of Court of Appeals of State of Georgia.

61 In the Court of Appeals for the State of Georgia.

E. A. BROWNING, Plaintiff in Error,
versus
CITY OF WAYCROSS, Defendant in Error.

Præcipe.

To the Clerk of the Court of Appeals of the State of Georgia:

Plaintiff in error in the above entitled cause hereby requests and directs you to transmit to the Supreme Court of the United States the following parts of the record therein, viz:

Original bill of exceptions, together with order thereon transmitting said cause from the Superior Court of Ware County, Waycross judicial circuit to Court of Appeals of the State of Georgia, together with entry of filing of said record in said last named court.

Opinion and judgment of said Court of Appeals, motion for rehearing and order overruling same.

Petition for writ of error, assignments of error, writ of error and order allowing same and of filing thereof; citation, together with return of service thereof and also writ of error.

62 Supersedeas bond, with approval thereof, and also copy of this præcipe, and all other portions of the record not herein before more specifically specified.

J. L. SWEAT,
RICHARD A. JONES,
Attorneys for Plaintiff in Error.

Filed in office May 4, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

63 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *May* 8, 1912.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, citation, and acknowledgment of

service, together with a true and complete transcript of the entire record and proceedings in the case of E. A. Browning v. City of Waycross, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals hereto affixed.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

Endorsed on cover: File No. 23,213. Georgia Court of Appeals. Term No. 259. E. A. Browning, plaintiff in error, vs. City of Waycross. Filed May 16, 1912. File No. 23,213.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 259.

E. A. BROWNING,
Plaintiff in Error,
vs.
CITY OF WAYCROSS,
Defendant in Error.

In Error to the Court of Appeals of the State of Georgia.

BRIEF OF PLAINTIFF IN ERROR.

J. L. SWEAT,
RICHARD A. JONES,
Attorneys for Plaintiff in Error.

STATEMENT.

This cause is here by writ of error prosecuted from decision of the Court of Appeals of the State of Georgia, a Court having under the laws of such State final jurisdiction over the subject-matter involved. Plaintiff in error was convicted in the Municipal Court of defendant in error for alleged violation of one of its City Ordinances and sentenced to pay a fine of $100, or work upon the chain gang for a period of ninety days. The ordinance under which such conviction was had provides that:

> Lightning rod agents or dealers engaged in the putting up or erecting lightning rods within the corporate limits of the City of Waycross shall pay to it an occupation tax of $25 per annum.

The Ordinance was enacted by virtue of the law contained in Sections 37 and 38 at page 1488 of the Georgia laws of 1909, entitled "New Charter of the City of Waycross," providing, amongst other things, that the Mayor and Aldermen thereof,

> shall have the power and authority to enact ordinances providing for the levy and collection of specific or occupation tax on business, occupations, professions, callings, trades or vocations exercised within said city, and to provide penalties for engaging therein without first paying such tax.

Within the time allowed by the laws of the State of Georgia, a petition for *certiorari* was presented to the Superior Court of Ware County, in said State, on behalf of plaintiff in error, alleging that the said Municipal Court erred in adjudging him guilty and imposing such sentence upon him, and assigning as error that under the evidence introduced same was illegal and in violation of the Interstate Commerce Clause of the Constitution of

the United States. Writ of *certiorari* was issued by such Superior Court to the Municipal Court of defendant in error, and upon consideration of the facts presented by the petition of plaintiff in error therefor and the answer of defendant thereto, said Superior Court entered judgment dismissing said *certiorari*, and in favor of defendant in error and against plaintiff in error. Writ of error was afterwards duly prosecuted to the Court of Appeals of Georgia from such judgment, and from the adverse decision of such court here.

The contention of plaintiff in error below and here was and is that all of the acts for which he was convicted by virtue of such ordinance, were done by him as an employe of St. Louis Lightning Rod Company, located in the State of Missouri, and as a part of the consideration for, necessarily incident to and connected with sales constituting commerce among the States, made by said employer to residents of the State of Georgia of lightning rods, located at the time of sale at the City of St. Louis, in the State of Missouri, afterwards carried in interstate traffic and delivered to the purchasers in the State of Georgia, and that so the acts of plaintiff in error in such connection are within the protection of the provision of Article I, Section 8, of the Constitution of the United States, relating to commerce among the States, and the ordinance insofar as sought to be applied to him acting in such capacity is void as being in contravention of such provision of the Constitution.

The record establishes (Rec., pp. 3, 7, 8,) all of the lightning rods put up or erected by plaintiff in error to have been in the performance of his duties as an employe of such lightning rod company, and in pursuance of and part performance of the sales made by it of lightning rods located at the time at the City of St. Louis, Missouri, then transported in interstate traffic to the City of Waycross, Georgia; by the terms of which sales, all evidenced

by written contracts, it was agreed between said Lightning Rod Company and the purchaser that: (Rec., p. 2.)

> "No charge shall be made for the erection of this material if done at the time of delivery."

The duties performed by plaintiff in error consisted in taking orders in the State of Georgia for his employer and transmitting them to it at St. Louis, Missouri. Thereupon the rods and ornaments called for by such orders were by such employer shipped in bulk to Waycross, Georgia, consigned to itself, and when received, the rods for each customer separated by plaintiff in error, who proceeded to attach them to the structures for which intended, collect the purchase price as provided by the existing contract therefor, and remit such collections to his employer at St. Louis, Missouri. No further or other charge was made. It required special skill, which plaintiff in error claimed to have, to erect such rods, and their erection was necessary as a part of the sale transaction and delivery to enable the employer of plaintiff in error to successfully carry on its business of making such sales.

The theory upon which the Court of Appeals of Georgia affirmed the judgment complained of is fairly apparent from the syllabus of the decision prepared under the direction of such court. It is as follows (Rec., p. 10):

> "The Interstate Commerce Clause of the Federal Constitution does not prohibit a State or one of its subordinate political sub-divisions from imposing a reasonable occupation tax upon the business of 'putting up or erecting lightning rods', and a person engaged in such business is subject to tax, notwithstanding it appears that the lightning rods were sold by him as agent for a non-resident manufacturer, under a contract which required the seller to install lightning rods. This is true without reference to whether the lightning rods are shipped from the

foreign State directly to the purchaser or are shipped as a part of a common mass with other property of the same character to the agent of the seller and distributed by him to the purchaser. Such a tax affects only incidentally, and does not impose an unlawful burden upon, interstate commerce.

The following is a copy of the ordinance hereinbefore referred to:

"An Ordinance to levy and collect specific and occupation taxes by the City of Waycross for the year 1911, as provided for by Section 37, of the New Charter of the City of Waycross contained in the Georgia Laws of 1910, and for other purposes.

Section 1. Be it ordained by the Mayor and Aldermen of the City of Waycross in regular meeting assembled, and it is hereby ordained by the authority of the same.

In addition to advalorem taxes on Real Estate and personal property, as required by the Constitution of the State of Georgia, the following specific or occupation taxes shall be levied and collected by the city of Waycross for the year 1911; said specific or occupation taxes being for the fiscal year or any part thereof, namely:

* * * * *

Lightning Rod Agents or dealers engaged in the business of fitting up or erecting.....$25.00

* * * * *

"Section 2. Be it further ordained, that no person shall engage in or carry on any business hereinbefore described without first making application for license, and paying for the same, and receiving a license or permit to carry on said business during the fiscal year, and any person who shall violate any of the provisions of this ordinance by carrying on any of said lines of business without first having paid for and received a license authorizing the same shall on conviction be punished as prescribed by the New Charter of the City of Waycross, relating to penalties for violation of any of the ordinances of said City."

Said New Charter of the city of Waycross relating to penalties for violation of any of the ordinances of said city, provides amongst others for fine of character assessed against plaintiff in error hereinbefore described.

SPECIFICATIONS OF ERROR.

The following errors contained in the assignment of errors herein, are relied upon and intended to be urged by plaintiff in error.

The Court of Appeals of the State of Georgia erred to the injury and prejudice and against the right of plaintiff in error in the following, particulars:

1. In determining and adjudging that the plaintiff in error was subject to and required to pay tax provided by ordinance enacted by defendant in error under Section 37 of the new Charter of the defendant in error, contained in the laws of the State of Georgia, and described in the record herein, requiring payment of the sum of $25.00 by lightning rod agents or dealers engaged in putting up or erection of lightning rods, and in affirming the judgment of the Superior Court of Ware County, Waycross Judicial Circuit, of said State, by which it refused to set aside or nullify the judgment of the Municipal Court of defendant in error, adjudging plaintiff in error guilty of a crime because of non-payment of said tax, and sentencing him therefor to fine of $100, or in default thereof to work upon the chain-gang of said city for a period of 90 days, all of the transactions of plaintiff in error, either as a lightning rod agent or otherwise, in the putting up or erection of lightning rods, or performance of other function or functions in connection therewith having reference to, solely concerning, directly connected with and being a part of the transaction of sale of lightning rods in commerce between citizens of the State of Georgia and State of Missouri, constituting interstate commerce, within the provisions and protection of Interstate Commerce Clause of the Constitution of United

States, Art. 1, Sec. 8, not subject to any local law, or of the law of the State of Georgia or the authority sought to be exercised by defendant in error in the conviction and sentence of plaintiff in error as aforesaid.

2. In holding and determining that the putting up or erection of the lightning rods by plaintiff in error upon the building or construction for which they were purchased, provided by the contract of sale to be made as a part of the consideration thereof and without charge to the purchaser, was not an incident and part of the sale of said rods, which sale was an interstate commerce transaction, and in refusing to hold that same was within the protection of the provisions of the Constitution of the United States concerning commerce between the States, Art. 1, Sec. 8, and that plaintiff in error by putting up or erecting said lightning rods became liable to and was required to pay tax referred to in the record and to conviction and sentence for non-payment thereof by the Municipal Court of defendant in error complained of and described in the record.

3. In determining that the transaction by which St. Louis Lightning Rod Company, a corporation of and located in the State of Missouri, sold to various persons in the State of Georgia lightning rods, and agreed as part of the consideration for such sales to attach and put on the building for which intended the rods so purchased, did not constitute interstate commerce within the protection of the Commerce Clause of the Constitution of the United States aforesaid, insofar as the erection of same upon the building was concerned and so that in the performance of such function for said Company, plaintiff in error became subject to and was required to pay the tax for non-payment of which he was convicted and sentenced as described in the record.

4. In refusing to sustain the right, privilege and ex-

emption especially set up and claimed by plaintiff in error under the Constitution of the United States and under the interstate commerce clause thereof, Art. 1, Sec. 8. that the functions performed by him and for which he was sought to be taxed and for non-payment of which tax he was adjudged guilty of the crime and sentenced as in the record set forth, was interstate commerce, and was not within the right or power of the State of Georgia or of defendant in error, or any other except the Congress of the United States, to regulate or to in any manner burden or limit.

5. In refusing to determine or adjudge that the ordinance of the defendant in error under which plaintiff in error was convicted and sentenced, was insofar as it sought to affect plaintiff in error in the performance of the function of erection, putting up, installing or attaching lightning rods in the performance of sales constituting interstate commerce was of non-effect and void as being in conflict with the Interstate Commerce Clause of the Constitution of the United States, Art. 1. Sec. 8, and could not constitute authority for the conviction or sentence of plaintiff in error for doing the acts or performing the functions described in the record in this cause.

6. In determining that the erection or putting up of the lightinng rods by plaintiff in error, as described in the record and under contracts of sale therein described, did not constitute the performance of a function directly dependent upon and a component part of commerce between the States and so within the protection of the Constitution of the United States, and more particularly of the provision of the clause thereof relating to interstate commerce, Art. 1, Sec. 8.

7. In refusing to set aside and nullify the judgment of conviction and sentence of plaintiff in error by the Mu-

nicipal Court of the City of Waycross, and refusing to sustain the right, privilege and immunity claimed by plaintiff in error, under Art. 1, Sec. 8, of the Constitution of the United States violated thereby.

BRIEF.

I.

The plaintiff in error as an employe of the St. Louis Lightning Rod Company of the City of St. Louis, in the State of Missouri, was engaged in taking orders in the City of Waycross, in the State of Georgia, for lightning rods located at, and to be shipped from the first to the last mentioned State.

When the rods arrived at Waycross, in pursuance to the terms and as a part of the consideration for the written contracts under which they were ordered, plaintiff in error, as such employe of said company, made delivery of the rods by erecting them upon the buildings for which purchased, then collected the purchase price and remitted to his principal at St. Louis. The only lightning rods put up, or erected by plaintiff in error were under the conditions aforesaid. The attaching of such rods to the buildings for which purchased by a skilfull employe of the company was necessary in order to enable it to successfully carry on the business of making sales of its said product, special skill being required for that purpose, which skill plaintiff in error claimed to have. No charge was made for the erection of the rods, which erection was done at the time and as a part of the act of delivery and of the consideration for the sale: (Rec., pp. 2, 3, 7.)

The judgment of the Superior Court for Ware County, Georgia, dismissing *certiorari* addressed to the proceedings and judgment of the Municipal Court of the City of Waycross and refusing to enforce the rights claimed by plaintiff in error under the Constitution of the United States, which judgment was affirmed by the Court of Ap-

peals of Georgia, is based upon the determination that, notwithstanding the existence of the facts stated in the petition for *certiorari* and answer thereto, still a condition was not presented requiring a different judgment (Rec., p. 8) and for the purposes of this proceeding the matters of fact aforesaid and other facts contained in said petition for *certiorari* and answer are to be taken as established.

II.

(a) The sale and purchase of these lightning rods located in another State, to be transported in pursuance thereof in interstate traffic to the place of delivery in the State of Georgia, fixed under the terms of such contract of purchase, was a transaction coming within the description of commerce among the States.

Crenshaw v. State of Arkansas, 227 U. S. 389;
Caldwell v. State of No. Carolina, 187 U. S., 622;
Rearick v. State of Pennsylvania, 203 U. S. 507.

(b) It is established by the record that the erection of lightning rods by the plaintiff in error was in pursuance of and as a part of sale transactions constituting interstate commerce and a necessary incident thereof, and the tax sought to be collected from him for the exercise of such function is within the prohibition against burdening commerce among the States by licenses, direct or indirect tax, or any system of State regulation.

Crutcher v. State of Kentucky, 141 U. S. 47, 62;
Caldwell v. State of No. Carolina, 187 U. S. 622, 628;
Barrett v. ~~State~~ City of New York, Vol. 34, No. 5 Supreme Court Reporter, p. 203, 207.

(c) Aside from such as may properly be put in effect in the exercise of its police power, any regulation or enactment of a State or political subdivision thereof, which

tends to materially interfere with, hinder, or obstruct the making or performance of contracts for commerce among the States, or anything reasonably incident thereto, is a burden upon such commerce which may not be laid other than by authority of the National Government.

The character of the incidents allowed to constitute parts of such contracts within the protection of the Commerce Clause of the Constitution and of the acts which have been held to constitute unwarranted interference therewith are illustrated by the following cases:

Dozier v. State of Alabama, 218 U. S. 124;
Barrett v. City of New York, Vol. 34, No. 5 Supreme Court Reporter, p. 203;
Rearick v. State of Pennsylvania, 203 U. S. 507;
International Text Book Co. v. Pigg, 217 U. S. 91;
Brown v. State of Maryland, 12 Wheat, 436, 444.

In the case first mentioned, Dozier v. Alabama, was involved the contention that because sale of a picture and frame which would otherwise come within the protection of the Commerce Clause of the Constitution, gave to the purchaser the option to, when delivery was tendered, accept or reject the frame—the price to be paid in case of acceptance being agreed upon, that so this constituted an intrastate transaction removed from the protection of the Commerce Clause of the Constitution and that the agent through whom sale was made for his non-resident principal, must make payment of State license levied upon the character of vocation involved.

The Court determines the transaction, both as to the sale of the picture and of the frame to come within the scope of the terms of the constitutional provision concerning interstate commerce and in such connection states, (*l. c.* 127-128):

> "No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that

the sale of it took place wholly within the State of Alabama, if a sale was made. But as was hinted in Rearick v. Pennsylvania, 203 U. S. 507, 512, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices', and the company and factory were in Chicago, obviously it was contemplated if not agreed that the frame should come on with the picture. In fact the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered as part of a transaction commercially continuous and one, and at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration it is implied, of the purchase already agreed to be made. We are of opinion that the sale of the frames can not be so separated from the rest of the dealing between the Chicago Company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions the statute as applied to this case is a regulation of commerce among the States and void under the Constitution of the United States."

In Barrett v. City of New York, *supra*, it is determined that a municipal ordinance requiring a local wagon license to be obtained as a condition precedent to using such vehicle in the conduct of an express business within the municipality is to be construed as not applicable to the transaction by the express company of its interstate business, since, construed otherwise the ordinance would be invalid as an unconstitutional regulation of commerce.

In Rearick v. Penn., *supra*, it is determined that where orders are given for goods sold in a State by an

agent employed to solicit them for a resident of another State and the purchaser is not bound to pay for the goods until delivery and unless according to sample, the goods sent for the customer in fulfilment of such orders are, until actually delivered, within the protection of the Commerce Clause of the Constitution and a municipal ordinance requiring a license fee for the solicitation of orders for delivering goods not of the parties' own manufacture, is void as an interference with interstate commerce insofar as it is sought to be applied to such agent.

In International Text Book Co. v. Pigg, *supra*, the right of a state to require a corporation organized under the laws of another State before transacting business therein, to procure a license for such purpose, is denied, where such business is of a character coming within the denomination of interstate commerce. The business here under consideration was that of teaching by correspondence, the corporation sought to be affected by such tax having an agent continuously in the State securing scholars and receiving and forwarding to it in another State the money obtained from them.

Brown v. State of Maryland, 12 Wheat, 436, 444, is cited to the general proposition that a license tax upon a vocation is a tax upon the object to which such vocation is applied.

Conclusion.

The record establishes that it was necessary for the employer of plaintiff in error, in order to carry on the business in which it was engaged, the manufacture and sale of lightning rods, to, in connection with such sales, erect through one of its skilled employees the rods upon the buildings for which intended.

The consideration for and a part of such contract of

sale was this agreement to deliver the rods placed upon the structure for which purchased. Until so attached the delivery was not complete or contract fulfilled. This is the case presented by the record. Without the right to erect such rods, sale thereof cannot be made or such business successfully prosecuted. Plaintiff in error was not in any respect engaged in erecting or putting up lightning rods except insofar as he performed such service for his employer in connection with the transactions described.

The tax sought to be enforced is not claimed on behalf of defendant in error to be, nor is it, in any respect levied in the exercise of the police power of the State of Georgia, or its municipal subdivision, the defendant in error. There is nothing in such law requiring persons pursuing the occupation for which the tax involved is levied and collected to have any special qualification therefor or any limitation in such connection except the payment of $25.00 per annum required by the terms of such ordinance. The amount sought to be collected under this ordinance is simply a tax levied against an occupation without reference to the manner in which such occupation is to be performed or seemingly the character of the transaction in which such function is to be exercised. The tax is not levied for the purpose of regulating an activity or industry nor to furnish funds, for instance, for the purpose of inspection or examination or other object of such character. It is just a tax, levied by virtue of the claimed right to such end conferred by the law of Georgia as a part of the Charter granted to defendant in error.

That this tax directly burdens commerce among the States in the character of commodities involved, is apparent. Under the contention of defendant in error as to its application it is to be levied and collected as a condition precedent to the right of a non-resident vendor

to itself make delivery in manner prescribed by the terms of its sale contracts of commodities sold in commerce among the States. Under such contention if the employer of plaintiff was a natural person, it could not itself attach lightning rods to structures for which sold, though the transaction constitute commerce among the States, without first making payment of such tax.

Suggestion is made in the opinion of the court from which the writ of error is prosecuted that the commodity involved could as well be erected by others upon the buildings for which intended as by the vendor itself, through its employes. The record itself contradicts such conclusion; but even if so, this does not in any manner furnish valid reason for burdening the interstate transaction had by plaintiff's employer with a tax upon its own employe while engaged in the performance of functions directly connected with and a part of such transaction. As well say that because others than the particular employe of a non-resident soliciting orders for sale of its merchandise located in another State could sell such goods that so the transactions had by such representative are not within the protection of the Constitutional provision. The question involved is the quality of the transaction without reference to the person through whom it is to be performed.

Until the lightning rods were delivered upon the building for which intended the purchaser could not be compelled to accept or make payment therefor; the transaction was incomplete. To require, as sought by the ordinance in question, payment of a charge by the seller for the performance of such element of the contracts involved by tax levied against its employe, just as effectually burdens the transaction as though such charge had been levied against the seller itself.

Plaintiff in error submits that the ordinance which he was adjudged guilty of violating is, as applied to the

subject-matter herein involved, in violation of the clause of Article 1, Section 8, of the Constitution of the United States having reference to commerce among the States and his conviction thereunder ought not be allowed to stand.

Respectfully submitted,

J. L. SWEAT,
RICHARD A. JONES,
Attorneys for Plaintiff in Error.

Nathan Frank
Of Counsel

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 259.

E. A. BROWNING,
Plaintiff in Error.

vs.

CITY OF WAYCROSS,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF FOR DEFENDANT IN ERROR.

W. W. LAMBDIN,
Attorney for Defendant in Error.

Braid & Hutton, Inc., Printers, Stationers, Lithographers, Savannah, Ga.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 259.

E. A. BROWNING,
Plaintiff in Error.

vs.

CITY OF WAYCROSS,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

STATEMENT OF THE CASE.

The statement of the case, as set out in the brief of the plaintiff in error is substantially correct, except as hereinafter stated. Plaintiff in error was fined $100.00 for violating an ordinance of the City of Waycross, which provided that "lightning rod agents or dealers engaged in the business of fitting or erecting lightning rods within the corporate limits of the City of Waycross, should first pay to the City a special tax of $25.00 and procure a license authorizing the

same before entering upon such business," etc. He carried the case by certiorari to the Superior Court of the County, and upon the certiorari being overruled, he sued out a writ of error to the Court of Appeals of the State of Georgia, where the conviction was confirmed. The opinion of the Court of Appeals is to be found in the printed record, pages 10 to 14, inclusive, and also in 11 Ga. App., page 46. Thereupon, plaintiff in error prosecuted this writ of error to the Supreme Court of the United States, making the assignments of error set out in the record.

There are several errors as to the evidence upon which Browning was convicted in the statement appearing in the brief of the plaintiff in error. The case as made in the brief of the plaintiff in error is different from what appeared on the trial. Under the law of Georgia, and the decisions of the highest courts of that State, the answer of the Mayor of the City who tried the case is to be looked for solely as to the evidence which was had at the trial. As stated by the Supreme Court of Georgia:

> "Upon the hearing of the certiorari, the answer to the writ, when not excepted to or traversed, will alone be considered by the Superior Court in ascertaining what occurred upon the trial in the court below."
>
> Hopkins vs. Sou. Ry. Co., 110 Ga., 85.

The Court of Appeals of Georgia lays down the same rule in the following language:

> "The evidence as specifically set forth by the County Judge in his answer to the writ of certiorari is conclusive, unless traversed, and a reviewing court will not look to the evidence as set forth in the petition for certiorari, to add to or in any manner to change the evidence as set forth in the answer."

Therefore, in this case, the Court will consider only the evidence which was set out in the answer made by J. M. Cox, Mayor of the City of Waycross, to the writ of certiorari served upon him in said case. This answer will be found on pages 6, 7 and 8, of the printed record (pages 13, 14, 15 and 16, of the original record). In this answer it appears that the order which was given for lightning rods was of the form set out at the bottom of page 2 of the printed record. This order, as seen from the blank form in the record, was not addressed to the St. Louis Lightning Rod Company, but was evidently addressed to the person taking the order. Nor was it an order for lightning rods, but was an order for materials out of which the lightning rods were to be constructed. The method of doing business was as follows:

> "These orders were transmitted to the principal office of the Company at St. Louis, and thereupon after a lot of orders had accumulated so as to make up a sufficient quantity for shipment in carload lots, the materials called for by said orders were then shipped by the Company in bulk in carload lots consigned to itself at Waycross, Georgia; the material for each order was not segregated or separated or identified in any way from the balance of the materials contained in the shipment but were all shipped in bulk together, the rods being shipped in 4 ft., 6 ft., 8 ft. and 10ft. lengths; on the arrival of these materials in Waycross it was the custom of the agent to take same in his wagon and go from house to house and put up the lightning rods; when he went to any particular house he would take from his wagon the materials with which to put up the particular job, selecting suitable lengths of the materials so as to suit the height of the house, etc.; the rods and materials for any particular job were not separate or different from the other jobs but were all alike, except where particular ornaments were ordered; and he hauled these materials

around in his wagon and he put up the lightning rods on the different houses from same indiscriminately. He then collected the amount of each order without any extra charge being made for the erection, and remitted the same direct to his Company at St. Louis; it required special skill, which he claimed to have, to properly erect said lightning rods; there were no marks or names on any of the rods shipped showing the orders to be filled thereby."

Printed record, bottom page 7 and top page 8.

It no where appears from the evidence of the case that the attaching of these rods to the buildings was necessary in order to enable the St. Louis Lightning Rod Company to successfully carry on the business of selling its rods. This was a mere statement made by plaintiff in error in his petition for certiorari, which was not borne out by the answer of the Mayor to same. Indeed, the Trial Court, the Superior Court of the County, and the Court of Appeals of the State of Georgia, decided this very point adversely to the contention of the plaintiff in error, as same was the main point at issue, and decided that from the evidence, the attaching of these lightning rods by the agent to the buildings was not necessary in order for him to make the sales. Had the evidence below shown that it was necessary, the decision might have been different. The case must stand or fall upon the evidence had in the Police Court as shown in the Mayor's answer to the writ of certiorari.

BRIEF.

1. With reference to the facts involved in this case, interstate commerce may be defined to be the "negotiation in one state of sales of goods which are in another state for the purpose of their introduction into the former state."

> Robbins vs. Shelby County Taxing District, 120 U. S., 489;
> Williams vs. Fears, 110 Ga., 589-590;
> 17 Am. & Eng. Encyc. Law (2nd Ed.), 65;

The question in this case, therefore, is whether the act, for which the defendant was fined in the Police Court, was interstate commerce or not.

2. The charge against defendant was not for selling or negotiating the sale of lightning rods for the St. Louis Company, but was for erecting and putting up lightning rods in the City without paying the license tax, which was quite a different thing. If he had taken orders for lightning rods and forwarded these orders to the St. Louis Company and the orders were there separately filled and put in separate packages as called for by the orders, so that one order could be distinguished from another, and the goods were then shipped directly to the customers or to the agent here for delivery to the customers, the agent would have been protected under the interstate clause of the Federal Constitution. But the defendant was not tried for taking these orders or for selling the lightning rods, but was tried for exercising an entirely different and an independent avocation, to-wit: Putting up lightning rods—which avocation required him to sort out suitable lengths from the mass of materials sent him and put them together and affix them to the houses of his customers. This work of erecting the lightning rods requires skill and

considerable time, and is a work and an avocation carried on strictly within the State of Georgia, and is independent and separate from the sale of the goods, and consequently is subject to regulation by the State. Even if this license tax imposed by the City upon the erection of lightning rods could in the least degree affect the sale of same, its effect upon interstate commerce would be so incidental and remote as not to amount to a regulation of such commerce. That such an incidental connection with interstate commerce would not place the defendant under the protection of the interstate commerce clause of the Federal Constitution is ruled in the following cases:

Ficklen vs. Shelby Taxing District, 145 U. S., 1;

STATE vs. GORHAM, 115 N. C., 721, 44 Am. State Rep., 494; 20 S. E., 179; 25 L. R. A. 810.

The last named case, that of State vs. Gorham, is a lightning rod case and directly and squarely in point, and was followed by the Supreme Court of North Carolina in STATE vs. SHEPPARD, 142 N. C., 590, 55 S. E. 146. It is exactly similar to the case at bar in all its phases, and the North Carolina Court held the defendant liable to the license tax, for two reasons, to-wit: (1st) The license was not upon the sale of lightning rods, but was upon the business of putting them up in North Carolina, and the connection between the pursuit of this avocation and the sale of the rods was so remote in its effect as to impose no burden upon interstate commerce; and (2nd) Because the manner of the sale and delivery of the rods was such as to divert even the sale of the rods of any feature of interstate commerce.

3. By reference to the form of the order set out in the record, it will be seen that the customer did not order lightning rods at all, he only ordered "MATERIAL for a system of Circuit lightning Rods." The materials only were shipped

into Georgia and the defendant took these materials and constructed lightning rods from them and erected same and affixed them to the houses of his customers. This work was done in Georgia and was not interstate commerce, but was domestic labor, pure and simple, and not commerce at all.

As well might tailors in Georgia claim that they were exempt from an occupation tax, because their home office in another state shipped the cloth to them upon orders for suits given by their customers, and all they did in Georgia was to make and put together the garments out of this material. This view of the law is recognized by the United States Supreme Court in the principal case relied on by plaintiff in error, that of Caldwell vs. North Carolina, 187 U. S., 622. The United States Supreme Court in that case, in discussing the decision of the Supreme Court of North Carolina which was reviewed in that case, said: "This decision (of the Court below) seems to proceed upon two propositions; first, that the pictures in question were not completed before they were brought to Greensboro, and second, that the articles were not shipped directly to the purchasers. But we are not disposed to concede that, under the facts in this case, the pictures were in any proper sense incomplete when received at Greensboro. That the frames and pictures were in separate packages was merely for convenience in packing and handling. Each picture was placed in the frame designated for it, and the selection of the frame was as much a part of the sale as the selection of the picture."

In the language above quoted, the Supreme Court of the United States recognized the principle contended for by us, namely: That if a mass of materials is sent into the state for the construction of lightning rods, and work has to be done upon those materials within the State of Georgia, so as to put them in completed condition, and further work has to be done in attaching them to the houses of the customers,—then the person engaged in this business is subject

to pay a state license, and the imposition of this license is in no sense an interference with interstate commerce.

4. We think that the principles above set forth rule the case squarely in our favor, because the license tax was not upon any sale of goods or commerce of any kind, but was upon work done and an occupation pursued entirely within this state. Even were this not true, the manner of the sale of the rods as set out in the evidence was clearly such as to divest it of any feature of interstate commerce, as stated by the Supreme Court of North Carolina in the case of the STATE vs. GORHAM, cited above.

The materials were shipped from St. Louis to Waycross in bulk in carload lots, and it was impossible to determine what materials were intended for any certain customer. The materials for any particular job were not separated from or different from any other job; and the rods were constructed and put up on the different houses indiscriminately from the mass of material. The purchaser had no means of identifying his lightning rods, and until the agent picked out the materials from which a customer's rod was to be made, the title did not pass to him. As stated in Bishop on Contracts, section 1309, quoted in Dunn vs. The State, in 82 Ga., 29, "To complete the sale, so that title will pass to the buyer, the goods must be separated from the bulk whereof they are a part, or in some other way be so distinguished or specified that they can be known." When, therefore, the car load of materials reached Waycross and the bulk was broken, said materials being then the property of the shipper and not dedicated to any particular purchaser, they become a part of the general property of the state and were, therefore, subject to regulation by the state.

State vs. Gorham (supra);
General Oil Co. vs. Crain, 209 U. S., 211;
Brown vs. Houston, 114 U. S., 622;
Emert vs. Missouri, 156 U. S., 296;

American Steel & Wire Co. vs. Speed, 192 U. S., 500;
Merchants Transfer Co. vs. Board of Review (Iowa), 2 L. R. A. (N. S.), 662;
Croy vs. Epperson, 104 Tenn., 525, 51 L. R. A., 254.

(In this case the Tennessee Supreme Court stated that the transaction was without the protection of the Federal Constitution, because the sales were not of original packages, but of parts of same after they had been broken and by force of law had become parts of the general property within the state.)

(a) From the manner in which the materials for the rods were shipped, it is clear that upon their arrival in Waycross no part of same belonged to any particular customer and no customer could identify any part of this mass as belonging to him. All of this mass, which thus came into the state in bulk belonged to the St. Louis Company, and the bulk being broken, same became a part of the general property of the State of Georgia and subject to local regulation in accordance with decisions above cited. According to the form of the order set out in the record the customer did not order rods at all, but only ordered materials and did not even order any definite quantity of materials but same had to be measured up after the rods were affixed to his house. Therefore, in order to make the sale, everything pertaining thereto had to be done within the State of Georgia and in the City of Waycross;—the materials had to be separated indiscriminately from the mass and suitable lengths selected and measured up in order to make the sale. Therefore, even the sale, under these circumstances, was intrastate and not interstate commerce.

Cases cited above;
35 Cyc. 281-282-283-284-285 and 286, and cases there cited, (subject, Sales);
Butler & Company vs. Lawshe, 74 Ga., 352 (4).

5. In People vs. Smith, 147 Michigan, 391, followed in Muskegan vs. Hanes, 149 Mich., 460, it was held that a city ordinance requiring peddlers to be licensed, was applicable, without unlawfully interfering with interstate commerce, to an agent soliciting orders which he transmitted to his principal in another state, where the goods were put in packages, packed in boxes and shipped to the agent, no particular package being put up for any particular customer and no package marked with the name of the customer.

And in Newcastle vs. Cutler, 15 Pa. Super. Ct., 612, it was held that an ordinance imposing, for the purpose of revenue, a license tax on peddlers, with goods of any kind for sale, was not unconstitutional as applied to one who took orders for groceries on behalf of principals in another state, to whom such orders were transmitted, and who thereupon placed in a car a sufficient quantity of goods to fill them, none of the packages being marked with the name of the purchaser, but the goods being consigned to the shippers themselves, who retained control of the goods until delivery, when the purchase price was paid to the agent making the delivery; as the sale of the goods was not in original packages and was completed in the state, and the transaction was one of domestic rather than interstate commerce. The same ruling was also made in the following cases:

Kimmell vs. State, 104 Tenn., 184;
Croy vs. Epperson, 104 Tenn., 525 (supra);
51 L. R. A. 354, 78 Am. St. Rep., 931.

(a) It is significant in this case that the order, according to the blank form set out in the record, was not addressed to the St. Louis Company, but was evidently addressed to the agent taking the order; and it is also significant, as above mentioned, that the order was not for completed lightning rods, but was for an indefinite quantity of materials.

(b) Under the decisions cited above, interstate commerce is traffic directly between citizens of different states, looking to the transportation of goods from one state into another, although an agent may bring the parties together. If the continuity of the current between the vendor and vendee is interrupted or broken, as was done in this case, and if the goods do not go directly from the vendor to the vendee, or to an agent for delivery to the vendee, then the transaction ceases to be interstate commerce. In this case, this current was broken because the mass of materials was shipped in bulk to the defendant at Waycross, without any particular part of same being intended for any particular purchaser. Consequently when the goods arrived thus in bulk at Waycross they were not impressed with the qualities of a sale to any particular customer, because no purchaser could tell which goods belonged to him. Consequently the sale of these goods really occurred in Waycross and was not interstate commerce, and therefore, subject to regulation by local authorities.

General Oil Co. vs. Crain, 209 U. S., 211 (supra);

Brown vs. Houston, 114 U. S., 622 (supra);

American Steel & Wire Co. vs. Speed, 192 U. S., 500 (supra);

Merchants Transfer Co. vs. Board of Review, 128 Iowa, 732, 2 L. R. A. (N. S.), 662, etc.

6. Irrespective of the foregoing contentions, there is another view which may be urged, namely, that the ordinance as affecting the transaction in question may be sustained under the police power of the state. It is clearly within the police power of the state and of the city (as delegated to it by the state), to impose regulations in the interest of the peace, health and good order of the state and for the protection of its citizens, although same may incidentally interfere with interstate commerce. The business of putting

up lightning rods is one which deals directly with the safety of the people and protection of their property, because such rods are used for transmitting a dangerous element and if not properly put up may result in danger to life and property. Consequently a city has the right, in the exercise of its police power, to require the persons engaged in this work to hold a license. The police power of the state is supreme, and reasonable exercise of it does not violate the commerce clause of the Federal Constitution.

Atlantic Coast Line R. R. Co. vs. State, 135 Ga., 545;

Vermont vs. Harrington, 34 L. R. A., 100;

State vs. Wheellock, 95 Iowa, 577, 30 L. R. A., 420;

Commonwealth vs. Newhall, 164 Mass., 338;

Cobe vs. Beentom, 64 N. J. L., 163.

(a) In State vs. Smithson, 106 Missouri, 140, it was held that a statute requiring persons dealing in the selling of patents, patent medicines, **lightning rods**, etc., to take out a license was not obnoxious to the commerce clause of the U. S. Constitution.

(b) The several states have the right to regulate persons and things within their own jurisdiction, under their police power, notwithstanding the regulation may have a bearing on interstate commerce, provided no discrimination is made against non-residents.

Slaughterhouse cases, 16 Wall., 62;

Passenger cases, 7 Howard, 548;

Sherlock vs. Alling, 93 U. S., 99;

Bartemeyer vs. Iowa, 85 U. S., 129 and 138;

Emert vs. Missouri, 156 U. S., 296;

Howe Machine Co. vs. Gage, 100 U. S., 676.

7. Doubts are always resolved in favor of the constitutionality of a statute. The violation must be clear and palpable in order for the statute to be held unconstitutional.

Cooley's Constitutional Limitations (6th Ed.), pages 216 to 220 and cases cited;

Plumley vs. Massachusetts, 155 U. S., 461, 479 and 480.

8. Under the facts of the case as shown in the answer to the certiorari, the Court could have well concluded that the plaintiff in error was conducting the business for himself, and was buying the materials from the St. Louis Company. The form of the order tends to show this. Furthermore, it is significant that the plaintiff in error did not disclose the nature of his contract with the St. Louis Company. The business was therefore not interstate commerce.

Banker Bros. Co. vs. Pennsylvania, 222 U. S., 210;

American Steel & Wire Co. vs. Speed (supra), 192 U. S., 521;

Croy vs. Epperson (supra), 104 Tenn., 525, 51 L. R. A., 254.

(a) "When one sought to be taxed under a municipal ordinance, for carrying on a particular business in a named city, seeks to set aside its provisions as to him because of the alleged unconstitutionality of such ordinance when applied to the business in which he is engaged, the burden is on him to show clearly and unmistakably the nature and character of his business, as well as his exemption from the tax imposed, before he will be entitled to an injunction to restrain its enforcement."

Price Company et. al. vs. City of Atlanta, 105 Ga., 358.

Continuing, the Supreme Court of Georgia, said in that case: "It is elementary that taxation is the rule and exemption from taxation the exception, and that one claiming to be exempt must be able to show such exemption by the clear and express provisions of some law. It is also true that one who attacks an act of a governmental body in whom the right of taxation has been vested, on the ground of the unconstitutionality of such act, must make its invalidity clearly and unequivocally appear. The conflict between the act and the fundamental law must be clear and palpable to warrant the courts in declaring the act unconstitutional. Wellborn vs. Estes, 70 Ga., 390; Howell vs. State, 71 Ga., 224. And any doubt on this point will be resolved in favor of the constitutionality of the enactment. Scoville vs. Calhoun, 76 Ga., 269."

The burden, therefore, was on the defendant, Browning, to show clearly, unequivocally and unmistakably that the ordinance in question was unconstitutional when applied to the business in which he was engaged. Under the facts in this case, it is clear that he failed to carry this burden.

(b) As stated by the Supreme Court of the United States in the case of Kehrer vs. Stewart, 197 U. S., on page 69, "The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business." This he failed to do, as held by the concensus of opinion of the Trial Court, the Superior Court of the County, and the Court of Appeals of Georgia. We invite a careful reading of the opinion of the Court of Appeals in this case. This Court recognized the general principles contended for by plaintiff in error, but held under the facts in this case, that the putting up of the lightning rods was not a necessary part or incident of the sale, but that its connection with the sale was entirely too remote to impose a burden upon interstate commerce.

Kehrer vs. Stewart, 197 U. S., 60;

Browning vs. City of Waycross, 11 Ga. App., 46;

Gorham vs. State (supra), 44 Am. St. Rep., 494;

American Amusement Co. vs. East Lake Chutes Co. (Ala.), 56 So. R., 961.

(c) In this case it was expressly held by the Court of Appeals of Georgia, that the ordinance in question "did not purport to levy a tax or license fee either upon the business of selling lightning rods, or upon the agency appointed by the seller to consummate this purpose. The primary object of the ordinance was to exact a license fee from persons engaged in installing or erecting lightning rods. The business of installing lightning rods is not so necessary a part of the business of selling lightning rods as that the two cannot be separated for the purpose of taxation. HERE IT DOES NOT APPEAR THAT INSTALLATION IS A NECESSARY PART OF THE TRANSACTION. Hence to tax merely the business of installing the rods is not an unlawful interference with interstate commerce." This decision, so construing the transaction in question in the light of the proven facts in the case, is sound and should stand.

Kehrer vs. Stewart, 197 U. S., 60 and 68.

9. In conclusion, we contend that under the authorities above cited and the facts involved in the case, the judgment of the Georgia Court of Appeals should be affirmed.

When the manner in which the goods were shipped to Waycross and the materials were then used indiscriminately for the different jobs, is considered, it is clear that even the sale of said materials or rods was not interstate commerce, but was a domestic transaction. Therefore, a license even

on the sale of these rods, conducted as it was in this case, would not have been obnoxious to the commerce clause of the Federal Constitution.

However, the charge made against the defendant was not for selling the rods, but was for putting them up or erecting them, which was quite a different thing from making the sale and clearly separable therefrom. If it was not separable therefrom, the burden was on the defendant to make this appear, and this he failed utterly to do, and the decision of the Trial Court on this question of fact is conclusive. Putting up lightning rods is not interstate commerce, but is the pursuit of a mechanical occupation; and the defendant having carried on this occupation in the City of Waycross without having paid the special tax and procured the license required by the city ordinance, he was properly convicted in the Police Court and the judgment of the Court below should be affirmed.

Respectfully submitted,

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Defendant in Error.

J. S. Felder
Attorney General of the
State of Georgia.

BROWNING *v.* CITY OF WAYCROSS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 259. Argued March 11, 1914.—Decided April 6, 1914.

A State may not burden, by taxation or otherwise, the taking of orders in one State for goods to be shipped from another, or the shipment of such goods in the channel of interstate commerce up to and including the consummation by delivery of the goods at the point of destination.

The business of erecting in one State lightning rods shipped from another State, under the circumstances of this case, was within the regulating power of the former State and not the subject of interstate commerce. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick*

v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124, distinguished.

Parties may not by the form of a non-essential contract convert an exclusively local business subject to state control into an interstate commerce business protected by the commerce clause so as to remove it from the taxing power of the State.

Quære, whether interstate commerce may not under some conditions continue to apply to an article shipped from one State to another after delivery and up to and including the time when the article is put together and made operative in the place of destination.

11 Ga. App. 46, affirmed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a municipal occupation tax on lightning rod agents and dealers, are stated in the opinion.

Mr. Richard A. Jones, with whom *Mr. J. L. Sweat* and *Mr. Nathan Frank* were on the brief, for plaintiff in error:

The sale and purchase of lightning rods located in another State, to be transported in pursuance thereof in interstate traffic to the place of delivery in the State of Georgia, fixed under the terms of such contract of purchase, was an interstate transaction. *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507.

The erection of lightning rods by the plaintiff in error was in pursuance of and as a part of sale transactions constituting interstate commerce and a necessary incident thereof, and the tax sought to be collected from him for the exercise of such function is within the prohibition against burdening commerce among the States by licenses, tax, or any system of state regulation. *Crutcher* v. *Kentucky*, 141 U. S. 47, 62; *Caldwell* v. *North Carolina*, 187 U. S. 622, 628; *Barrett* v. *New York*, 232 U. S. 14.

Aside from such as may properly be put in effect in the exercise of its police power, any regulation or enactment of a State or political subdivision thereof, which tends to

materially interfere with, hinder, or obstruct the making or performance of contracts for commerce among the States, or anything reasonably incident thereto, is a burden upon such commerce which may not be laid other than by authority of the National Government.

The character of the incidents allowed to constitute parts of such contracts within the protection of the commerce clause of the Constitution and of the acts which have been held to constitute unwarranted interference therewith are illustrated by the following cases: *Dozier* v. *Alabama*, 218 U. S. 124; *Barrett* v. *New York*, 232 U. S. 14; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Brown* v. *Maryland*, 12 Wheat. 436, 444.

It was necessary for the employer of plaintiff in error, in order to carry on the business in which it was engaged—the manufacture and sale of lightning rods—to, in connection with such sales, erect through one of its skilled employés the rods upon the buildings for which intended.

The consideration for and a part of such contract of sale was this agreement to deliver the rods placed upon the structure for which purchased. Until so attached the delivery was not complete or contract fulfilled. Plaintiff in error was not in any respect engaged in erecting or putting up lightning rods except in so far as he performed such service for his employer in connection with the transactions described.

This tax directly burdens commence among the States in the character of commodities involved.

The ordinance is, as applied to the subject-matter herein involved, in violation of the commerce clause of the Federal Constitution.

Mr. Thomas S. Felder, Attorney General of the State of Georgia and *Mr. W. W. Lambdin*, for defendant in error, submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error was charged in a municipal court with violating an ordinance which imposed an annual occupation tax of $25 upon "lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits" of the City of Waycross. Although admitting that he had carried on the business he pleaded not guilty and defended upon the ground that he had done so as the agent of a St. Louis corporation on whose behalf he had solicited orders for the sale of lightning rods; had received the rods when shipped on such orders from St. Louis and had erected them for the corporation, the price paid for the rods to the corporation including the duty to erect them without further charge. This it was asserted constituted the carrying on of interstate commerce which the city could not tax without violating the Constitution of the United States. Although the facts alleged were established without dispute, there was a conviction and sentence and the same result followed from a trial *de novo* in the Superior Court of Ware County where the case was carried by certiorari. On error to the Court of Appeals that judgment was affirmed, the court stating its reasons for doing so in a careful and discriminating opinion reviewing and adversely passing upon the defense under the Constitution of the United States (11 Ga. App. 46). From that judgment this writ of error is prosecuted because of the constitutional question and because under the law of Georgia the Court of Appeals had final authority to conclude the issue.

The general principles by which it has been so frequently determined that a State may not burden by taxation or otherwise the taking of orders in one State for goods to be shipped from another or the shipment of such goods in the channels of interstate commerce up

to and including the consummation by delivery of the goods at the point of shipment have been so often stated as to cause them to be elementary and as to now require nothing but a mere outline of the principle. The sole question, therefore, here is whether carrying on the business of erecting lightning rods in the State under the conditions established, was interstate commerce beyond the power of the State to regulate or directly burden. The solution of the inquiry will, we think, be most readily reached by briefly reviewing a few of the more recently decided cases which are relied upon to establish that although the interstate transit of the lightning rods had terminated and they had been delivered at the point of destination to the agent of the seller, the business of subsequently attaching them to the houses, for which they were intended, constituted the carrying on of interstate commerce. The cases relied on are *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507 and *Dozier* v. *Alabama*, 218 U. S. 124.

Caldwell v. *North Carolina* concerned the validity of an ordinance of the village of Greensboro, imposing a tax upon the business of selling or delivering picture frames, photographs, etc. The question was whether Caldwell, the agent of an Illinois corporation, was liable for this tax because in Greensboro he had taken from a railroad freight office certain packages of frames and pictures which were awaiting delivery and which had been shipped to Greensboro by the selling corporation to its own order for the purpose of filling orders previously obtained by its agents in North Carolina. After the packages of frames and pictures were received by Caldwell, in a room in a hotel, the pictures and frames were fitted together and were delivered to those who had ordered them. The assertion that there was liability for the tax was based on the contention that the act of Caldwell in receiving the pictures and frames and bringing them together was not under the

protection of the commerce clause, but was the transaction of local business after the termination of interstate commerce, especially because the pictures and frames had been shipped from Chicago in separate packages and, because the pictures and frames were incomplete on their arrival, and were made complète in the State by the union accomplished after the end of their movement in interstate commerce. Both of these propositions were decided to be unsound and it was adjudged that as both the pictures and frames had been ordered from another State and their shipment was the fulfillment of an interstate commerce transaction, the mere fact that they were shipped in separate packages and brought together at the termination of the transit, did not amount to the transaction of business within North Carolina which the State could tax without placing a direct burden upon interstate commerce. In *Rearick* v. *Pennsylvania*, where the right to levy a tax was decided not to exist because to sustain it would be a direct burden upon interstate commerce, the only question was whether the form in which certain shipments of goods were made from Ohio into Pennsylvania to fill orders was of such a character as to cause the act of the agent of the shipper, who opened the packages for the purpose of distributing the goods to those for whom they were intended, to amount to the carrying on of business in the State of Pennsylvania. *Dozier* v. *Alabama* in substance concerned the principles applied in the two previous cases with the modification that it was there held that because there was no binding obligation on a purchaser to accept the frame which was to accompany a picture ordered from another State and transmitted through interstate commerce, did not take the case out of the previous ruling.

It is evident that these cases when rightly considered, instead of sustaining, serve to refute, the claim of protection under the interstate commerce clause which is here

relied upon since the cases were concerned only with merchandise which had moved in interstate commerce and where the transactions which it was asserted amounted to the doing of local business consisted only of acts concerning interstate commerce goods, dissociated from any attempt to connect them with or make them a part in the State of property which had not and could not have been the subject of interstate commerce. Thus, in *Caldwell* v. *North Carolina,* the court laid emphasis upon the fact that the shipment of the pictures in interstate commerce in one package and the frames in another was not essential but accidental for the two could have been united at the point of shipment before interstate commerce began as well as be brought together after delivery at the point of destination. And this was also the condition in the *Rearick Case.* Indeed, it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, but simply to prevent the recognized local limitations from being used to put the conceded interstate commerce power in a straight-jacket so as to destroy the possibilities of its being adapted to meet mere changes in the form by which business of an inherently interstate commerce character could be carried on.

We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed, was within the regulating power of the State and not the subject of interstate commerce for the following reasons: (a) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete

an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true, that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause. It is manifest that if the right here asserted were recognized or the power to accomplish by contract what is here claimed, were to be upheld, all lines of demarkation between National and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one State to the other and intended to be used after delivery in the construction of buildings or in the making of improvements in any form would or could be made interstate commerce.

Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect, a suggestion however which we deem it unnecessary to do more than mention in order to refute it.

Affirmed.